

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

JUN 11 5 24 PM '92

MM Docket No. 92-121 ✓

In re Applications of

ROSAMOND RADIO, INC. File No. BPH-910225MG
(hereafter "RRI")

JAMIE LEIGH COBERLY File No. BPH-910225MH
(hereafter "Coberly")

DIANE K. HITT File No. BPH-910225MI
(hereafter "Hitt")

For Construction Permit
for a New FM Station on Channel 228A
in Rosamond, California

HEARING DESIGNATION ORDER

Adopted: May 18, 1992;

Released: June 11, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.¹

2. *RRI*. An engineering study of *RRI*'s application reveals that it is short-spaced to the licensed facilities of co-channel Station KRZE-FM, Ontario, California, on Channel 228A. *RRI* recognizes this short-spacing and requests processing pursuant to the contour protection provisions of 47 C.F.R. § 73.215. On July 11, 1991, *Hitt* filed an objection against *RRI*'s application alleging that the engineering proposal would be in violation of the 8.0 kilometer requirement of 47 C.F.R. § 73.215(e). *RRI*'s opposition, filed on August 2, 1991, states that based on the Commission's rules, as well as the obvious purpose of those rules, its proposal complies with the clear language of 47 C.F.R. § 73.215.

3. The Commission, in its *Report and Order* to MM Docket 87-121, adopted 47 C.F.R. § 73.215 to afford FM applicants and licensees some flexibility in the selection of transmitter sites.² In this *Report and Order* the Commission established a temporary 8.0 kilometer maximum short-spacing requirement. *Report and Order*, at 1688. The Commission recently affirmed the 8.0 kilometer requirement upon reconsideration.³ During the pendency of MM Docket 87-121, the Commission had before it MM Docket

88-375 which proposed, in part, to increase the spacing requirements and maximum transmitting power for Class A stations. The Commission, in its *Second Report and Order*, MM Docket 88-375, increased the spacing requirements of 47 C.F.R. § 73.207 and increased the maximum permitted effective radiated power for Class A FM broadcast stations from 3.0 to 6.0 kilowatts.⁴ In the *Second Report and Order*, the Commission stated that applications and petitions filed prior to October 2, 1989 must comply with, and will be processed in accordance with, the current rules. *Second Report and Order*, at 6382. In the instant case, Channel 228A was allotted to Rosamond, California in the Commission's *Notice of Proposed Rule Making* in MM Docket 89-344, 4 FCC Rcd 6188 (1989). See *Report and Order* in MM Docket No. 89-344, 5 FCC Rcd 7408 (1990). Since this rule making was initiated before the October 2, 1989 effective date of the new Section 73.207 rules, and the Rosamond allotment is short spaced to the licensed facilities of KRZE-FM under the new rules, applications for the Rosamond allotment could be processed pursuant to 47 C.F.R. 73.213(c)(1), which permits these applicants to use the old Section 73.207 spacing rules.⁵ Therefore, applying the 8.0 kilometer restriction to the spacing requirement of the old Section 73.207, *RRI*'s proposal is not in violation of the 8.0 kilometer restriction of 47 C.F.R. § 73.215(e). Accordingly, *Hitt*'s objection against *RRI*'s application will be denied. We note that *RRI*'s application is in compliance with all other aspects of 47 C.F.R. § 73.215.

4. *Transmitter Location*. On August 20, 1991, *Hitt* filed an informal objection against *Coberly*'s application alleging that the engineering proposal will not provide either city grade coverage or line-of-sight to Rosamond as required by 47 C.F.R. § 73.315. *Coberly*'s opposition, filed on September 5, 1991, indicates that based on the prediction method prescribed by the Commission's rules, its proposal provides the requisite city grade coverage and the terrain between the proposed transmitter site and the city of Rosamond does not constitute a "major obstruction" under Section 73.315. In addition, *Coberly*'s opposition argues that *Hitt* misstates the city boundaries of Rosamond as the area served by the Rosamond post office when it is "the Commission's well established policy that an unincorporated community is defined by its census designated boundaries."

5. Section 73.315(a) of the rules, 47 C.F.R. § 73.315(a), requires that the transmitter location be chosen so that "a minimum field strength of 70 dB above one uV/m (dBu), or 3.16 mV/m, will be provided over the entire principal community to be served." Section 73.315(b) states, in pertinent part that "[t]he location of the antenna should be so chosen that line-of-sight can be obtained from the antenna over the principal city or cities to be served; in no event should there be a major obstruction in this path." The Commission has allowed minor deviations of line-of-sight, stating that Section 73.315(b) "does not absolutely require line-of-sight over an FM applicant's principal community." *Rush County Broadcasting Co., Inc.*, 20 RR 2d 783

¹ A fourth applicant, BPH-910226MD, was dismissed on July 29, 1991, for violation of the Mexico-United States FM Broadcasting Agreement.

² See *Report and Order*, MM Docket No. 87-121, adopted December 12, 1988, released February 22, 1989, 4 FCC Rcd 1681, 1684 (1989).

³ See *Memorandum Opinion and Order*, MM Docket No.

87-121, released on September 17, 1991, 6 FCC Rcd 5356, 5359 (1991).

⁴ See *Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

⁵ The *Report and Order* in MM Docket No. 89-344, at footnote 4, 5 FCC Rcd 7408 (1990), indicated that applicants could avail themselves of the provisions of 47 C.F.R. § 73.213(c)(1).

(1970). In *Jesse Willard Shirley*, 24 RR 2d 982 (1972), the Commission held that there was no violation of Section 73.315(b) where the city to be served was covered by the 3.16 mV/m contour despite the fact that several hills obstructed the line-of-sight into the city. In addition, the Commission has adopted the doctrine of "substantial compliance" with respect to the city coverage rules. If an applicant provides service to 80% of the residential area of its community of license, it is in substantial compliance with the city coverage requirement. *John R. Hughes, et al.*, 50 Fed. Reg. 5679 (1985). Determinations of substantial compliance and accurate measurements cannot be made where applicants are basing their coverage predictions on inconsistent assessments of the city's boundaries. In order to properly evaluate each applicant's proposal, the Commission must examine the applications and their assertions from a standardized frame of reference. Since there appears to be a substantial and material question of fact as to the boundaries of Rosamond, an appropriate issue will be specified as to all applicants. In addition, the objection filed by Hitt will be denied.

6. *Other Matters.* Our engineering study indicates that Coberly and Hitt failed to address the matter of how they propose to resolve any RF exposure to workers on their respective towers. See 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). See also, *Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, applicant must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Coberly and Hitt failed to indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. See generally, OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Coberly and Hitt will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposal. See 47 C.F.R. § 1.1308(d).

7. The Commission requires that if there are five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Coberly has filed such statement, it is deficient. Coberly has not listed a minority organization. Accordingly, Coberly will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

8. Coberly petitioned for leave to amend her application on June 27, 1991, and November 12, 1991. The accompanying amendments were filed after May 17, 1991, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

9. Section III, Item 3 of FCC Form 301 requires that an applicant identify each source of funding, including the name, address and telephone number of the source. Hitt has not completed Item 3 correctly. Hitt's application identifies Bruce W. Gary as a lender, but does not give his address. Accordingly, Hitt must submit an amendment which gives all the information required by Section III, Item 3 to the presiding Administrative Law Judge after this Order is released.

10. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposals of the applicants would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.
2. If a final environmental impact statement is issued with respect to Coberly and Hitt in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the objections filed by Hitt against the applications of RRI and Coberly ARE DENIED.

14. IT IS FURTHER ORDERED, That in accordance with paragraph 6 hereinabove, Coberly and Hitt shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Coberly shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Coberly ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That Hitt shall submit an amendment which contains the information required by Section III, Item 3 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this order.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order

in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166,168 (1990), *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau